Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1222

No. _____

In The

Supreme Court of the United States

October Term, 1988

HOLLYWOOD MARINE, INC.,

Petitioner,

versus

WIEDEMANN & FRANSEN, A.P.L.C.,

Respondent.

Petition For Writ of Certiorari To The Supreme Court For The State of Louisiana

ORIGINAL PETITION ON BEHALF OF HOLLYWOOD MARINE, INC.

TERRIBERRY, CARROLL & YANCEY

ROBERT S. REICH
RUFUS C. HARRIS, III
L. R. DEBUYS, IV
3100 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-3100
(504) 523-6451
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

67 pp

I. QUESTIONS PRESENTED FOR REVIEW

A. Whether, under the General Maritime Law, a discharged attorney or any creditor of a seaman has standing to contest a seaman's release, and whether the Louisiana Supreme Court erred in applying state law to hold that such parties can contest a seaman's release.

II. LIST OF PARTIES

At the time of the Louisiana Supreme Court's September 12, 1988 judgment, Hollywood Marine, Inc. was a respondent, Tenneco Oil Company was a respondent, and Wiedeman & Fransen was an Applicant. Upon information and belief, Tenneco will not be petitioning this Court for review of the Louisiana Supreme Court's judgment.

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V. REPORT OF OPINIONS DELIVERED IN COURTS BELOW

While it is anticipated that the Louisiana Supreme Court's judgment of September 12, 1988 will be published, to date it has not been, and there are no other published opinions of the lower courts.

VI. STATEMENT OF JURISDICTION

On September 12, 1988, the Louisiana Supreme Court entered a judgment reversing the decision of the Louisiana Fourth Circuit Court of Appeal. A timely petition for rehearing was filed by petitioner, and on October 20, 1988, the Louisiana Supreme Court entered an order denying rehearing. The instant petition is from the Louisiana Supreme Court's judgment of September 12, 1988.

The Court has jurisdiction over this matter pursuant to 28 USC section 1257.

VII. STATEMENT OF STATUTES AND LAW INVOLVED

This matter involves the interpretation of the General Maritime Law of the United States of America.

VII. STATEMENT OF THE CASE

A. Statement of the facts

On May 8, 1985, Randy Lee Neely sustained injury while working as a deckhand for defendant/petitioner

Hollywood Marine, Inc. On May 13, Neely was approached by intervenor/respondent, the law firm of Wiedemann & Fransen, and presented with a contingency fee contract, which he signed. [Appendix 1]. On June 13, 1985, a petition for damages was filed on behalf of Neely, seeking damages for the subject accident.

Over the next six months, plaintiff became dissatisfied with his representation by respondent, and fired it on at least two occasions for failing, among other things, to return his telephone calls and to pursue settlement as directed.

Respondent was fired for the second and last time on November 19, 1985. Thereafter, plaintiff telephoned petitioner at its office in Houston, Texas, and advised that he had fired his lawyer and was interested in settling his claim directly with petitioner. On November 22, 1985, plaintiff signed a release, discharging petitioner Hollywood Marine, Inc. from any and all liability arising out of the claimed accident. [Appendix 2]. In return, plaintiff received $50,000, and petitioner's agreement to pay for two future operations.

At the time plaintiff and petitioner executed the release, the contingency fee contract previously signed by plaintiff was not of record. In fact, it was not until November 25, six days after Neely had discharged his attorney and three days after he had released petitioner, that the contingency fee contract was filed in the Court's record.

B. Course of Proceedings and Disposition in Courts Below

Following its discharge by plaintiff, respondent, Wiedemann & Fransen, filed a petition of intervention [Appendix 3], seeking attorney's fees it claimed were due and owing in payment of its legal services. Alternatively, the intervention asserted that the settlement entered into between plaintiff and petitioner was void by virtue of the provisions of the contract's "no settlement" clause, and the provisions of L.S.A.-R.S. 37:218, which governs the filing of contingency fee contracts. By subsequent amendment, the petition of intervention added a claim asserting the nullity of plaintiff's release; that plaintiff's settlement was unenforceable; and, that plaintiff, "a ward of the admiralty court", was incapable of settling his own cause of action. [Appendix 4].

Because the contingency fee contract and petition of intervention were not filed until after plaintiff's execution of the receipt and release, petitioner Hollywood moved the district court for summary judgment seeking dismissal of respondent's petition of intervention as amended.[1] To its motion, petitioner attached the signed November 22, 1985 receipt and release; a copy of the transcript executed at the time of the settlement where plaintiff was informed of his rights; and copies of plaintiff's depositions. The district court granted Hollywood's motion, holding that "intervenor's contingency fee

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[1] Petitioner asserted that failure timely to file a contingency fee contract under Louisiana law causes an attorney to lose his privilege to fees as against third-parties. See, L.S.A.-R.S. 37:218.

contract was not timely filed . . . [and] . . . the compromise agreement between defendant and plaintiff, Randy Neely, was satisfactory and enforceable in plaintiff's best interest and not overreaching. [Appendix 5].

Respondent appealed from the district court's order, and on December 30, 1987, the Louisiana Fourth Circuit Court of Appeal affirmed the district court's order, holding that respondent had no standing to contest the release and that the contingency fee contract was not filed timely, and hence unenforceable. [Appendix 6].

Respondent next petitioned the Louisiana Supreme Court for a Writ of Certiorari seeking review of the appellate court's ruling. By its judgment rendered on September 12, 1988, the Louisiana Supreme Court overturned the decision of the lower court, relying on this Court's decision in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) [Appendix 7], and held that "as creditor", respondent had standing to contest the seaman's release. While this issue had been raised at all levels of judicial review, it was not until the Louisiana Supreme Court's judgment that the issue was decided adverse to petitioner.

Following the Louisiana Supreme Court's September 12, 1988 judgment, petitioner filed a petition for rehearing asserting, *inter alia*, that respondent was without standing to contest the release. On October 20, 1988, the Louisiana Supreme Court, without written reasons,

denied the petition for rehearing. [Appendix 8] Thereafter, the instant Petition for Writ of Certiorari was filed with this Court.

IX. SUMMARY OF ARGUMENT

THE GENERAL MARITIME LAW, AND NOT LOUISIANA STATE LAW, GOVERNS THE RIGHT TO CONTEST A SEAMAN'S RELEASE, AND NEITHER A DISCHARGED ATTORNEY NOR A SEAMAN'S CREDITORS HAS A RIGHT TO CONTEST THE SEAMAN'S RELEASE UNDER THE GENERAL MARITIME LAW. THE LOUISIANA SUPREME COURT ERRED IN APPLYING STATE LAW TO CREATE STANDING IN "THIRD PARTIES" TO CONTEST A SEAMAN'S RELIEF.

X. ARGUMENT

The Louisiana Supreme Court, by its September 12, 1988 judgment, has established dangerous precedent affecting the substantive rights of seamen. In its judgment, the Court creates standing in the discharged attorney and the creditors of a seaman to contest the personal injury settlement made by the seaman. For the reasons outlined below, this holding is in direct contravention of the General Maritime Law. If this judgment is not overturned, seaman's releases in the State of Louisiana will become impractical, if not impossible, thus depriving seamen of the right to settle litigation to avoid trial.

It is settled law that "[q]uestions regarding the enforceability or validity of . . . [settlement] agreements are determined by federal law – at least where the substantive rights and liabilities of the parties derive from federal law". *Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386, 389 (5th Cir. 1984) (*Citing, Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir. 1981)). Where, as here, a contest arises regarding the validity of a Jones Act seaman's release, questions regarding the validity and enforceability of the agreement are governed by the General Maritime Law. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). *A fortiori*, the determination of standing to contest such a release likewise must be governed by the General Maritime Law.

In the instant case, the Louisiana Supreme Court erred by applying state law to resolve the standing issue. Specifically, it was improper for the Court to conclude that respondent and any other creditor of plaintiff, pursuant to Louisiana Code of Civil Procedure Article 2086, had standing to contest plaintiff's settlement.[2] The Court's apparent reliance on Ethical Consideration 7-12 of the Code of Professional Responsibility similarly is an improper basis upon which to create standing. The Ethical Considerations of the Code are merely instructive and

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[2] Article 2086 reads as follows:

" A person who could have intervened in the trial court may appeal, whether or not any other appeal has been taken."

are in no manner incorporated into the General Maritime Law.

When viewed properly under the General Maritime Law, there is no support for the Louisiana Supreme Court's holding that respondent and Neely's creditors have standing to contest the release. Two basic tenets support this conclusion. First, under the General Maritime Law, a seaman has a virtual absolute right to settle or compromise his litigation without the knowledge or consent of his counsel or others. *Lewis v. SS BAUNE*, 534 F.2d 1115, 1122 (5th Cir. 1976). If a seaman can settle his suit without the consent of his former counsel or others, it follows that such parties cannot contest the release on the grounds that consent was not obtained. On this basis alone, respondent and Neely's creditors lack standing to contest the release.

The second basic tenet of the General Maritime Law is that the avenue of settlement must be preserved to seamen who desire to settle their litigation *pro se*.

> [I]f employers are denied any degree of confidence in the finality of a settlement, seamen will lose the option to settle since employers will have little incentive to avoid a full-scale trial on the merits. Denying seamen that option is no kindness.

Borne v. A & P Boat Rentals No. 4, Inc., 780 F.2d 1254, 1257 (5th Cir. 1986). To safeguard the avenue of settlement to a seaman, it is necessary to recognize that third-party attorneys and creditors have no standing to upset the release a seaman has made. Otherwise, the threat of third-party litigation will deter defendants from settling with seamen.

The Louisiana Supreme Court's creation of "third-party" standing leads to consequences directly adverse to the aforestated tenets. Specifically, although the General maritime Law recognizes that a seaman has a virtual absolute right to settle his litigation without the consent of others, if the seaman or settling defendant does not obtain the consent of counsel or the seaman's creditors, they can expect to have such parties move to upset the release. Additionally, although the General Maritime Law encourages confidence in the finality of settlements, there can be absolutely no such confidence where a party, other than the seaman, has the right to contest the release. Indeed, under the present "Louisiana" scheme, the seaman has no option but to proceed to trial, despite his own desire to settle, if his former counsel or his creditors contest the release.

If the Louisiana Supreme Court's judgment stands, it is doubtful whether a seaman in the State of Louisiana will ever again be able to convince his employer to settle with him to avoid a trial on the merits. This result should not be condoned, and this Court should conclude that only the seaman, who alone has standing to recover for his injury, has standing to contest his release.

Several pertinent questions arise in view of the Louisiana Supreme Court's present holding. Does the Court's holding mean, as it purports to state, that any creditor of a seaman, even, for example, the Internal Revenue Service, can intervene and upset a personal injury release if it is unhappy with the amount the seaman recovered? Can a person injured in an automobile accident caused by the negligence of a seaman upset the settlement the seaman has made to attempt to create a larger "money pot"

to attach when he asserts claim against the seaman? Can the holder of a mortgage on a seaman's house contest the seaman's personal injury settlement in an attempt to create a larger fund to apply towards the seaman's indebtedness? The answer to these questions must be – No! The discharged attorney, the Internal Revenue Service, a seaman's creditors, and others should not be given free reign to disrupt a seaman's settlement of a personal injury lawsuit. It is the seaman, not the aforementioned third-parties, who knows who was truly at fault for the accident, who knows the extent of his injuries and who must re-live the trauma during litigation. No third-party should be permitted to force a seaman to participate in the litigation of a suit, regarding the seaman's injuries, if the seaman does not wish to do so.

Under the Louisiana Supreme Court's decision, woe is the seaman who has a creditor or engages, then discharges, counsel. From that point on, the seaman's life is no longer his own, and his former attorney or his creditors have never ending control of his destiny. At any time, these third-parties can re-open the seaman's case, without the seaman's approval or acquiesence, to question the seaman's decision. Petitioner respectfully submits that a seaman, by entering that occupation, does not commit himself to a never ending curatorship under the administration of his former attorney or his creditors. Petitioner urges this Court to end the curatorship created by the Louisiana Supreme Court, and to hold that neither respondent nor Neely's creditors has standing to contest the seaman's release.

Should this Court properly conclude that respondent has no standing to contest the release, respondent will

not be without remedy. Indeed, respondent continues to have the right to pursue a claim against its former client for the attorneys' fees it has incurred. Similarly, any other creditor of plaintiff continues to have the right to sue plaintiff, if necessary, to recover any outstanding indebtedness.

Parenthetically, it should be noted that during the appellate review of this case, plaintiff once again engaged respondent as his counsel. A suit has been filed on plaintiff's behalf in the United States District Court for the Eastern District of Louisiana, contesting the release. Regardless, the improper ruling of the Louisiana Supreme Court stands, effectively preventing seamen from settling their cases while "former counsel" and creditors are "at large". This impediment to the seaman's right to settle his personal injury suit must be removed and the Louisiana Supreme Court's decision must be overturned.

Respectfully Submitted,

TERRIBERRY, CARROLL & YANCEY

ROBERT S. REICH
RUFUS C. HARRIS, III
L. R. DEBUYS, IV

XI. APPENDIX

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CONTRACT OF EMPLOYMENT
OF
WIEDEMANN & FRANSEN
ATTORNEYS AT LAW
821 BARONNE STREET
NEW ORLEANS, LOUISIANA 70113

New Orleans, La., May 13, 1985

THIS CONTRACT BETWEEN RANDY C. NEELY, hereinafter called client, and WIEDEMANN AND FRANSEN, hereinafter called Attorneys,

WITNESSETH:

The Client, domiciled in New Orleans, La. employs and retains WIEDEMANN AND FRANSEN, Attorneys, as his Counsel and Attorneys, to represent him and handle the settlement of suit, claim or proceedings, as follows, to-wit:

Any and all claims and proceedings arising out of a May 8, 1985 accident aboard a vessel at the Tenneco Dock, with full power to institute any and all proceedings that said Attorneys may deem necessary or expedient in representing the interests of Client, and to compromise said suit, claim or proceeding for an amount which the Attorneys may deem reasonable, subject to the approval by Client. Client hereby agrees not to settle or compromise the suit, claim or proceeding personally with defendant, and not to employ any other counsel in this matter, and that should client do so, the entire fee hereinafter specified shall be paid to Attorneys. Client hereby grants to Attorneys special lien and privileges on the amount recovered in this matter, to secure the fee hereinafter agreed upon.

Client further authorizes Attorneys to obtain any and all records or documents relating to Client's claim that Attorneys deem necessary, and to sign in his behalf such authorizations. Client, for and in consideration of Attorneys having agreed to represent client in this matter, and for other consideration, hereby agrees to pay to attorneys from the gross amount recovered, the following contingent fee percentage 33 1/3% of any money recovered if settled; 40% of any money recovered if litigated and further grants to Attorneys an undivided interest in and to the subject matter of this suit or claim, to secure the fee agreed upon aforesaid. Client authorizes attorneys to incur such expenses, including the employment of medical or other experts, as they deem necessary for the proper investigation and presentation of this claim, and agrees that such expenses shall be reimbursed to Attorneys upon successful completion of the case.

Attorneys hereby agree to represent client in this matter, upon the terms and conditions set forth herein. Read to and by Client before signing.

Randy L. Neely

_____

_____

_____

FULL AND FINAL RELEASE

STATE OF TEXAS S
S KNOW ALL MEN BY
COUNTY OF HARRIS S THESE PRESENTS:

THAT I, RANDY L. NEELY, a single male, born November 27, 1964, Social Security No. 459-92-3240, for and in consideration of the sum of FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00), in addition to prior payments of maintenance in the amount of TWO THOUSAND SEVEN HUNDRED FORTY-FIVE AND NO/100 DOLLARS ($2,745.00), and prior payments of cash advances in the amount of THREE HUNDRED FIFTY-FOUR AND NO/100 DOLLARS ($354.00), all to me in hand paid, and prior medical invoices for medical treatment and services rendered to me totalling TWENTY THOUSAND SIX HUNDRED SEVENTY-FOUR AND NO/100 DOLLARS ($20,674.00) paid on my behalf, all paid by and on behalf of all parties and vessels hereinafter released, the receipt and sufficiency of which is hereby acknowledged and confessed, have RELEASED, ACQUITTED and FOREVER DISCHARGED, and by these presents for myself, and for my heirs, executors, administrators, legal representatives, successors and assigns, do hereby RELEASE, ACQUIT and FOREVER DISCHARGE HOLLYWOOD MARINE, INC., CREOLE JANICE, LTD. and TENNECO OIL COMPANY, their respective parents, subsidiaries and affiliates, the M/V CREOLE JANICE and Tenneco Barge T-128, their respective engines, tackle, etc., together with all other vessels owned, operated, chartered or controlled by the forgoing parties, and with respect to each, their masters, officers, captains, crews, agents, servants, employees, charterers,

successors and assigns, and all underwriters at risk on all of the above persons, firms, corporations, business entities and vessels, who may be or might later become liable, of and from any and all claims, demands, debts, dues, liens, actions or causes of action of whatsoever nature of character which against those persons, firms, corporations, business entities or vessels, I, or my heirs, executors, administrators legal representatives, successors and assigns ever had, now have or ever may have, now or in the future, for, on account of or by reason of any matter or thing whatsoever, growing out of, arising from or in any manner connected with my employment by HOLLYWOOD MARINE, INC., and/or connected with any of the other parties hereby released in any capacity at any time, including, but by no means limited to my presence onboard the M/V CREOLE JANICE and/or Tenneco Barge T-128 or any other vessel owned, operated, controlled and/or chartered by any of the parties hereby released or growing out of, arising from or in any manner connected with an accident allegedly experienced by me on or about May 9, 1985, as a result of which I sustained injuries to my head, nose, face, eyes, ears and other parts of my body generally, including, but not limited to the bones, muscles, ligaments, cartilages, blood vessels and/or any other structures of my head, nose, face, eyes, ears, and body generally as were allegedly bruised, contused, ruptured, broken, fractured, sprained, irritated and/or otherwise injured as I was employed as a deckhand onboard the M/V CREOLE JANICE, assisting in hooking up a dock hose on the Tenneco Barge T-128 at the Tenneco Dock in Chalmette, Louisiana.

The said sum of FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00) and other sums referenced and acknowledged above are accepted by me in full and final satisfaction of all my claims for damages, personal injuries, aggravation of pre-existing physical conditions, medical and hospital expenses, wages, transportation expenses, interest, penalties, maintenance and cure, compensation benefits under the Longshoreman's and Harbor Worker's Compensation Act, the Outer Continental Shelf Land Act, the Texas and Louisiana Workmen's Compensation Acts, or any other compensation act of any kind or description, liabilities under the Jones Act, the General Maritime Law, loss of income, past, present and future, pain and suffering, past, present and future, physical disability, past, present and future, mental anguish, past, present and future, loss of society, companionship, consortium, or any other liability under any statute, state or federal, or any other liability whatsoever, contractual or tortious in character, at law, in equity or in admiralty, now or in the future, in any way related to or occurring as a conquence of the matters and things described herein.

I, RANDY L. NEELY, fully understand that I might not know at this time the true extent and nature of the injuries and/or illnesses and/or other damages sustained by me, occurring as a result of the matters and things described herein and this Release is intended to cover anything that might have happened to me in the past or that may or will happen to me in the future as a result of the matters and things described herein, and I recognize fully that my condition may improve or that it may not, and indeed I may have permanently disabling injuries.

I, RANDY L. NEELY, understand, agree, warrant and covenant by this Release that neither I nor anyone claiming by, through of under me, will ever have the right to file a suit or claim for any money or any other benefits of any kind against the parties and vessels hereby released as a result of the matters and things described herein even if my condition becomes worse or I later discover other injuries and/or illnesses or other damages not now apparent or known to me. Notwithstanding the foregoing, HOLLYWOOD MARINE, INC. has agreed to pay the necessary and reasonable hospital and doctor expenses for two (2) further surgical operations, one to attempt to improve the hearing in my left ear and the other to assist in lessening the partial paralysis on the left side of my face and in attempting to restore the ability to more fully close my left eye, provided that these surgeries occur on or before one (1) year from the date of signing of this document. All other medical, hospital and doctor charges from and after the date of signing of this document shall be for my sole account and not for the account of any party or vessel hereby released.

I, RANDY L. NEELY, have had my rights under the law carefully explained to me, and I fully understand that I have legal rights, including the right to be represented by an attorney and to file a lawsuit. I have previously retained an attorney who has filed a lawsuit on my behalf against HOLLYWOOD MARINE, INC. and TENNECO OIL COMPANY. However, I have voluntarily dismissed my attorney, Fritz Wiedemann of Wiedemann & Fransen prior to signing this document. While fully understanding and realizing my legal rights, I want to make this

settlement in order to conclude all of my claims against the parties and vessels named or identified herein.

I RANDY L. NEELY, understand, agree and acknowledge that THIS IS A FULL, FINAL AND COMPLETE RELEASE AND THAT THE SUMS OF MONEY AND OTHER CONSIDERATIONS MENTIONED ABOVE ARE ALL THAT ARE EVER TO BE PAID TO ME BY THE PARTIES AND VESSELS HEREBY RELEASED IN RELATION TO THE MATTERS AND THINGS DESCRIBED HEREIN.

For the same consideration as hereinabove mentioned, I, RANDY L. NEELY further RELEASE, ACQUIT and FOREVER DISCHARGE the parties and vessels hereby released from all causes of action which were or could have been alleged by me in that certain styled suit "Randy Neely v. Hollywood Marine, Inc. and Tenneco Oil Company" now pending in the Civil District Court for the Parish of Orleans, State of Louisiana, Division "J" under Number 85-10125 and I agree that upon execution of this Full & Final Release and payment of the sums aforesaid, said suit will by dismissed by me with prejudice and with each party to bear his respective costs of court. I will sign all documents necessary to obtain the dismissal of said suit with prejudice.

I RANDY L. NEELY further solemnly state that this Full and Final Release is not being made because of any persuasive statement or representation or promise by anyone whomsoever or for anything other than what is recited herein, and I further agree that the money paid for this Release is no admission of liability on the part of the parties hereby released or the unseaworthiness or

fault of any of the vessels hereby released, that they are simply buying their peace, and I will never claim that it is otherwise.

EXECUTED at Houston, Texas, in multiple originals this 22 day of November, 1985.

/s/ Randy L. Neely
RANDY L. NEELY

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared, RANDY L. NEELY, known to me to be the person who executed the foregoing Full and Final Release, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and none other; that he executed the same as his free, voluntary act and deed after having it fully explained to him and after realizing the effect thereof to be a full, final and complete Release and discharge of the said parties and vessels for any matter or thing dealt with in said instrument; and that he further did execute the same without any persuasion, promise, threat, force, duress, fraud or representation of any kind by any person whomsoever, and that at the time of exection of the said Release, he, RANDY L. NEELY, was completely sober, sane and capable of understanding the nature and character of his acts and deeds and was in complete charge of all of his faculties and capable of executing this Release and understanding the significance thereof.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 22nd day of November, 1985.

/s/ Mariann D. Heber
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

Commission Expires 7-23-88

printed or stamped name of Notary:
/s/ Mariann D. Hebe

CIVIC DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
NO. 85-10125 DIVISION "J" DOCKET NO. 4
RANDY NEELY
VERSUS
HOLLYWOOD MARINE, INC., ET AL

FILED:_____ _____
DEPUTY CLERK

PETITION OF INTERVENTION
(Filed Nov. 25, 1985)

Wiedemann & Fransen, a professional law corporation, organized under the laws of the State of Louisiana and domiciled in the Parish of Orleans, State of Louisiana, intervenes in the above entitled and numbered cause and represents:

I.

On May 13, 1985 plaintiff in the above entitled and numbered cause entered into a contingent fee contract with the Intervenor in which plaintiff engaged Intervenor to represent him in a Jones Act and General Maritime Claim arising out of an accident that occurred on May 8, 1985. A copy of the employment contract is attached hereto and marked Intervenor "Exhibit A" for the purposes of identification.

II.

In connection with the aforesaid contract of employment, Intervenor instituted the above captioned suit on June 13, 1985.

III.

On November 21, 1985 plaintiff, without cause or reason, discharged intervenor from the further representation of him in any matters arising out of the accident of May 8, 1985.

IV.

Intervenor since its engagement by plaintiff has prosecuted plaintiff's claim in a vigorous, effective, and professional manner.

V.

In furtherance of its obligation under the contract Intervenor has incurred $6,190.03 in costs and has committed itself to the payment of additional costs to various physicians and institutions, all of which are due and owing to Intervenor by plaintiff under the attached contract in addition to the contingent fee therein provided.

VI.

Intervenor, under its contract, it entitled to 33 1/3% of any amount recovered by way of settlement and 40% of any amount recovered through litigation.

VII.

In the alternative, and should the court find that the contingent fee contract is no longer the measure of Intervenor's compensation then, and in that event, Intervenor

alleges that it is entitled to $200,000.00 in attorneys fees on a quantum meruit-accomplishment basis.

VIII.

Intervenor shows to the Court that it has this day filed its contract of employment of record with the Clerk of this Court and attaches evidence of filing hereto marked as Intervenor "Exhibit B".

IX.

Intervenor submits that the aforesaid recordation, renders any settlement, compromise, discontinuance, or other disposition null and void and creates a lien herein on any compromise, or judgment, reached or rendered herein under LSA-R.S. 37:218, and asks that the Court so find.

WHEREFORE, intervenor prays for leave of court to file the within Petition of Intervention and after the legal delays and due proceedings had that there be judgment herein against plaintiff for 33 1/3% of any amount recovered by him in the premises in compromise, or 40% of any amount recovered through litigation, in compensation for attorneys fees rendered on behalf of plaintiff as a consequence of the accident of May 8, 1985, together with costs in the amount of $6,190.03 and undetermined additional costs guaranteed by Wiedemann & Fransen to various physicians and institutions, and all costs of these proceedings and legal interest thereon from date of settlement, or judgment, on any amount for which plaintiff is cast in this Intervention.

In the alternative, Intervenor prays for $200,000.00 in attorneys' fees on a quantum meriut-accomplishment basis.

WIEDEMANN & FRANSEN

BY: /s/ Lawrence D. Wiedemann
LAWRENCE D. WIEDEMANN
821 Baronne Street
P. O. Box 30648
New Orleans, LA 70190
Telephone: (504) 581-6180

ORDER

Let the above and foregoing Petition of Intervention be filed as prayed.

New Orleans, Louisiana, this ___ day of ____, 1985.

_____
JUDGE

PLEASE SERVE PETITION OF INTERVENTION AS FOLLOWS:

Rufus C. Harris, III
Attorney for Hollywood Marine, Inc.
2100 International Trade Mart Bldg.
New Orleans, LA 70130

Mr. John E. Galloway
Attorney for Tenneco Oil Company
643 Magazine Street
New Orleans, LA 70130

Hollywood Marine, Inc.
through its Agent for Service
C. T. Corporation Systems
400 Poydras Street
New Orleans, LA

Tenneco Oil Company
through its Agent for Service
C. T. Corporation Systems
400 Poydras Street
New Orleans, LA

CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition of Intervention has been forwarded to all counsel of record in these proceedings by depositing same in the United States Mails, postage prepaid, this 25th day of November, 1985.

/s/ Lawrence D. Wiedemann
LAWRENCE D. WIEDEMANN

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
NO. 85-10125 DIVISION "J" DOCKET NO. 4
RANDY NEELY
VERSUS
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FILED:_____ _____
DEPUTY CLERK

FIRST SUPPLEMENTAL AND AMENDED PETITION OF INTERVENTION

Intervenor, Wiedemann & Fransen, A.P.L.C., desires to supplement and amend the original Petition of Intervention filed herein in the following particulars, to-wit:

1.

By adding an additional paragraph to the numbered Paragraph X which shall provide as follows:

X.

The release purportedly executed by Randy L. Neely on November 22, 1985 is null and void for the following reasons, among others that will be shown at the time of trial, to-wit:

a) The consideration paid is grossly inadequate for the injuries and disabilities sustained by this seaman and ward of this court;

b) The seaman could not know the consequence of his injuries and the value of his case because the release itself reflects two contemplated surgical procedures

scheduled to attempt to improve a hearing deficit and a paralysis of the face;

c) The seaman was under the active care of physicians at the time of alleged execution of the release and the full extent of his injuries had not been determined as of that date;

d) Defendant encouraged and induced the seaman to discharge intervenor in order that the improper and disadvantageous release pled could be caused to be executed.

By adding an additional paragraph to be numbered Paragraph XI which shall read as follows:

XI.

This court has authority and control over its wards including minors and seamen and should disregard and ignore any releases not approved by this court and particularly one which is null and void on its face.

3.

By adding an additional paragraph to be numbered Paragraph XII which shall read as follows:

XII.

The joint Motion to Dismiss with prejudice and Order of Dismissal and Final Judgment filed and entered in these proceedings on December 12, 1985 are null and void in that they were filed and entered subsequent to the filing and service of Intervenor's

Petition of Intervention and Filing and Recordation of Attorneys Fees Contingent Contract on November 25, 1985 and, accordingly, any discontinuance of the suit is null and void under LSA-R.S. 37:218.

WHEREFORE, Intervenor prays for leave to file the within First Supplemental and Amended Petition of Intervention and after the legal delays and due proceedings had that there be judgment herein in favor of Wiedemann & Fransen, A.P.L.C., as originally prayed and amended herein.

WIEDEMANN & FRANSEN

BY: /s/ Lawrence D. Wiedemann
LAWRENCE D.
WIEDEMANN
821 Baronne Street
P. O. Box 30648
New Orleans, LA 70190
Telephone: (504)581-6180

CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading has been forwarded to all counsel of record in these proceedings by depositing same in the United States Mails, postage prepaid, this 5th day of March, 1986.

/s/ Lawrence D. Wiedemann
LAWRENCE D. WIEDEMANN

ORDER

Let the above and foregoing First Supplemental and Amended Petition be filed as prayed.

New Orleans, Louisiana, this 6 day of March, 1986.

(Sgd) George C. Connolly, Jr.
JUDGE

A TRUE COPY
/s/ D. M. Cadaro
DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

A TRUE COPY
/s/ H. Taylor
DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 85-10125 DIVISION "J" DOCKET #4

RANDY NEELY

vs.

HOLLYWOOD MARINE, INC., ET AL

FILED:_____ DEPUTY CLERK:_____

O R D E R

On October 3, 1986, hearing was conducted on Hollywood Marine, Inc.'s Rule to Show Cause why plaintiff's petitions of intervention should not be dismissed. After review of the briefs submitted and after oral argument by counsel for Hollywood Marine, Inc. and intervenor, Wiedemann & Fransen, this Court holds that intervenor's contingency fee contract was not timely filed. This Court further holds that the compromise agreement between defendant and plaintiff, Randy Lee Neely, was satisfactory and enforceable in plaintiff's best interests, and not overreaching.

Accordingly, IT IS ORDERED by the Court that intervenor's petitions of intervention be and are hereby dismissed, each party to bear its respective costs of court.

New Orleans, Louisiana this 28th day of October, 1986.

/s/ George C. Connolly, Jr.
DISTRICT JUDGE

Respectfully submitted,

TERRIBERRY, CARROLL & YANCY

BY/s/ Robert S. Reich
ROBERT S. REICH
RUFUS C. HARRIS, III
L. R. DeBUYS, IV
2100 World Trade Center
New Orleans, Louisiana 70130
(504) 523-6451

RANDY NEELY	NO. CA 7523
VERSUS	FOURTH CIRCUIT
HOLLYWOOD MARINE, INC. and TENNECO OIL COMPANY	COURT OF APPEAL STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, HONORABLE GEORGE CONNOLLY, JUDGE

December 30, 1987

PHILIP C. CIACCIO

JUDGE

(Court composed of Judges Robert J. Klees, Philip C. Ciaccio and Joan Bernard Armstrong)

LAWRENCE D. WIEDEMANN
W. LLOYD BOWERS
Wiedemann & Fransen
New Orleans, Louisiana 70113
Attorneys for Appellant

ROBERT S. REICH
RUFUS C. HARRIS, III
L. R. DeBUYS, IV
Terriberry, Carroll & Yancey
New Orleans, Louisiana
Attorneys for Appellee

AFFIRMED

Randy Neely v. Hollywood Marine, Inc. et al CA 7523
Wang NO. 0089M

This is an appeal from a judgment of the district court which granted summary judgment and dismissed the appellant's petition of intervention. We affirm.

On May 13, 1985, intervenor, the law firm of Wiedemann & Fransen entered into a contract of representation with the plaintiff Randy Neely. On June 13, 1985 the intervenor filed a petition seeking damages on behalf of the plaintiff for serious injuries he sustained as a deckhand aboard the M/V Creole Janice. On November 21, 1985 plaintiff discharged his attorneys of record. The following day, November 22, 1985, Neely entered into a release of liability with defendants Hollywood Marine, Inc. and Tenneco Oil Company. In consideration of $50,000, plaintiff discharged the defendants from any and all liability arising from the maritime accident. Defendants also agreed to pay all medical expenses that might be incurred in connection with two surgical procedures contemplated by plaintiff, provided the surgery took place within 1 year from the date of the release.

On November 25, 1985, Wiedemann & Fransen filed a petition of intervention seeking reimbursement of medical expenses and costs, as well as an enforcement of its contingent fee, or alternatively, legal fees of $200,000 on the basis of quantum meruit. They annexed a copy of the contingent fee contract which had been executed by the plaintiff. On December 5, 1985 defendants answered the intervention with a general denial.

On December 12, 1985 plaintiff, Randy Neely, and defendants Hollywood Marine, Inc. and Tenneco Oil Company filed a joint motion to dismiss plaintiff's suit with prejudice, based upon the parties' contract of compromise and release. On that date, the district court rendered an order of dismissal and final judgment, which dismissed, with prejudice, the plaintiff's suit against these defendants.

On February 26, 1986 defendants filed a motion for summary judgment and memorandum in support thereof as well as a statement of uncontested facts which alleged the following:

(1) Plaintiff, Randy Neely discharged his attorneys, Wiedemann & Fransen on November 21, 1985.

(2) On November 22, 1985 plaintiff granted defendants, Hollywood Marine, Inc. and Tenneco Oil Company a full and complete release from any and all claims arising from plaintiff's alleged accident.

(3) On November 25, 1985 attorneys Wiedemann & Fransen filed their contingency fee contract with the court.

The intervenors amended their petition of intervention on March 5, 1986 to allege the nullity of plaintiff's release and nullity of the court's order dismissing plaintiff's suit. They also filed a memorandum in opposition to the motion for summary judgment, but they did not dispute the defendant's statement of uncontested facts.

On October 28, 1986 the trial court granted the defendant's motion for summary judgment and dismissed the petition of intervention. The court found that the "intervenor's contingency fee contract was not timely filed" and "the compromise agreement . . . was satisfactory and enforceable . . . ." The intervenor has filed a devolutive appeal of this judgment.

The sole issue presented on appeal is whether the trial court erred in granting the defendant's motion for summary judgment dismissing the petition for intervention.

On appeal the intervenor alleges that the mental capacity of the plaintiff precluded his valid confection of the receipt and release. Additionally, they urge that since they filed their intervention and contract of employment on November 25, 1985 and the compromise agreement and motion to dismiss were not filed until December 12, 1985 (with notice thereof received March 4, 1986) that the disposition of the suit occurred after their intervention and was, hence, void.

The Louisiana Code of Civil Procedure provides for summary judgment:

> Art. 966. Motion for summary judgment; procedure
>
> A. The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.
>
> B. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.
>
> * * *

We first address the intervenor's contention that the release and receipt are null and void.

The intervenor has admitted that on November 21, 1985 plaintiff discharged them and hence they do not represent the plaintiff.

In *Scott v. Kemper*, 377 So. 2d 66 at 70 (La., 1979), the Louisiana Supreme Court discussed the right of an attorney whose client desires to (or has) discharge(d) him:

> Thus an attorney can neither force his continued representation of a client who wishes to discharge him, nor obtain, by any means, a proprietary or ownership interest in the client's claim. Therefore, he may not proceed with the suit or claim as if settlement had not been made. And he has no right to interfere with or nullify the settlement which his former client has made, (as in this case) or chooses to make.

For these reasons we find that the intervenor has no standing before this court, (nor did he have standing before the district court, to urge the invalidity of the plaintiff's receipt and release.

We also find the cases cited by the intervenor in support of his position to be factually distinguishable from the present. *Garrett v. Moore – McCormack Co.*, 317 U.S. 238, 63 S. Ct. 246 (1942); *Parodi v. American President Lines, Ltd.*, 269 F. Supp. 696 (Cal., 1967). In *Garrett, supra* and *Parodi, supra*, the *plaintiffs* sought to set aside releases they had executed. In this case it is a third party who seeks to invalidate a release executed by the plaintiff and with which the plaintiff is apparently satisfied.

We also disagree with the intervenor's allegations that their intervention and contract were filed timely because they were recorded before the compromise agreement and motion to dismiss. This matter is controlled by Louisiana Revised Statute Title 37 Section 218, which provides in pertinent part:

La. R.S.: 37, Section 218

Contracts for fees based on proportion of subject-matter; stipulations concerning compromise.

By written contracts signed by the client, attorneys at law may acquire as their fee an interest in the subject matter of the suit, proposed suit, or claim in the prosecution or defense of which they are employed, whether the suit or claim be for money or for property. In such a contract for employment, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file it with the clerk of the district court in which the suit is pending or is to be brought and have an original or certified copy made and served by registered or certified mail on the opposing party. *After such service, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client without the written consent of the other is null and void and the suit or claim shall be proceeded with as if no such settlement or discontinuance had been made.* (Emphasis Supplied)

The statute clearly contemplates the contingent fee contract's effect on third parties *after* it is filed of record. Accordingly, for this continent fee contract to have had an effect upon the settlement of the parties to this suit, it must have been filed of record *before* the execution of the settlement. Since the settlement took place November 22, 1985 and the intervention and contingency fee contract were not filed of record until November 25, 1985, it was not timely and it could not act as a basis to void the settlement.

Since there were no issues of material fact, the mover was entitled to judgment as a matter of law. The trial court correctly granted the defendant's motion for summary judgment and dismissed the petition of intervention. This decision in no way precludes any action which the intervenor may have against their former client for recovery of their attorneys' fees. Additionally, this decision in no way precludes the intervenor from proceeding against Hollywood Marine and Tenneco for payment of attorney's fees and costs to the extent that the defendants assumed that obligation as part of the settlement with Neely.

Although intervenor urged in brief that we consider the conduct of defendants, and their attorneys, in an ethical context, those complaints, if they have any validity, are more properly addressed to the appropriate professional ethics committee.

Accordingly, the judgment of the district court is affirmed at intervenor's cost.

AFFIRMED

SUPREME COURT OF LOUISIANA

No. 88-C-0618

RANDY NEELY

Versus

HOLLYWOOD MARINE, INC. and
TENNECO OIL COMPANY

On Writ of Certiorari, or Review, to the
Court of Appeal, Fourth Circuit,
Orleans Parish, Louisiana
(Filed Sept 12, 1988)

DIXON, Chief Justice

In this case the plaintiff, Randy Neely, a seaman, discharged the attorneys representing him in a maritime personal injury suit against the defendants, Hollywood Marine, Inc. and Tenneco Oil Company. Plaintiff then entered into a settlement with the defendants. Plaintiff's attorneys, the law firm of Wiedemann & Fransen, filed a petition in intervention in the seaman's suit seeking enforcement of its contingent fee contract with plaintiff and reimbursement for medical expenses and other costs incurred in the prosecution of the suit. The contingency fee contract was simultaneously filed with the clerk of court and served in conformity with R.S. 37:218. The attorneys later filed a supplemental petition of intervention alleging the nullity of the settlement agreement.

The trial court first dismissed the suit with prejudice and later granted the defendants' motion for summary judgment dismissing the petition of intervention and held the compromise agreement between plaintiff and defendants "was satisfactory and enforceable in plaintiff's best interests and not overreaching." The court of

appeal affirmed. Neely v. Hollywood Marine, Inc., 518 So.2d 1151 (La.App. 4th Cir. 1987) We reverse.

On May 8, 1985 plaintiff, a twenty-two year old deckhand, sustained head and facial injuries in an accident on board a vessel owned by Hollywood Marine, Inc. Plaintiff has undergone surgical procedures for neuropsychological damage, scarring and a hearing deficiency as a result of this injury. On May 13, 1985 plaintiff entered into a contingency fee contract for representation with intervenors, Wiedemann & Fransen. The contingency fee contract contained a provision specifying that the client "agrees not to settle or compromise the suit, claim or proceeding personally with defendant, and not to employ any other counsel" in the matter. On June 13, 1985 the plaintiff's lawyers filed a Jones Act and general maritime suit against defendants in the Civil District Court of Orleans Parish seeking damages on behalf of the plaintiff for the injuries he sustained as a deckhand in Hollywood Marine's employ. Suit was filed under the Judiciary Act of 1789, 28 U.S.C., §133 (the "saving to Suitors' Clause").

On November 19, 1985 plaintiff mailed an undated letter to the intervenors discharging them.[1] This letter was typed by an employee of Hollywood Marine in Houston, Texas while plaintiff was in Houston to discuss the possibility of a settlement with the defendants. At the time of these settlement discussions, defendants knew the plaintiff was under the care of several doctors because of his injury and was facing further surgery. The intervenors received the letter discharging them on November 21, 1985. These negotiations with plaintiff leading to the release were carried on in Houston by Mr. Thomas Vacek,

vice president in charge of claims for Hollywood Marine, and his assistant, Kem Coen.

Plaintiff returned to Houston the next day, November 22, and entered into a release and compromise in which defendants agreed to pay him $50,000 and to pay the future medical expenses for two further surgeries, provided the surgeries were done within one year from the date of the contract. In consideration for this settlement, plaintiff agreed to discharge the defendants from any and all liability arising from the maritime accident. Plaintiff was unrepresented in the negotiation of this settlement agreement. A sworn statement by plaintiff was taken in Houston at the Hollywood Marine offices before Mr. Ronald White, the Texas attorney for Hollywood Marine. The statement was recorded by a shorthand reporter, with Mr. Vacek of Hollywood Marine present. At that time plaintiff was asked to sign a joint motion for dismissal with prejudice. Plaintiff signed this motion and accompanying order without representation.

On November 25, 1985 Wiedemann & Fransen filed a petition of intervention seeking reimbursement of medical expenses and costs paid on behalf of plaintiff as well as an enforcement of its contingent fee contract, or, in the alternative, intervenors sought legal fees of $200,000 on the basis of quantum meruit. On December 5, 1985 defendants answered the intervention with a general denial.

---

[1] On November 5, 1985 plaintiff entered into a second contingent fee contract with intervenors, and on November 16, 1987 intervenors filed a suit in federal court, Eastern District of Louisiana, alleging nullity of the settlement agreement and seeking damages.

On joint motion of plaintiff and defendants, the trial court on December 12, 1985 ordered dismissal with prejudice of plaintiff's suit. This dismissal was based on the compromise and release agreement between plaintiff and defendants. The motion was the one which plaintiff signed while in Houston; he was unrepresented and signed the motion himself. The motion to dismiss was filed in New Orleans by defendants' Louisiana attorney, Rufus Harris of Terriberry, Carroll and Yancey. Intervenors were not notified of the dismissal.

On February 26, 1986 defendants filed a motion for summary judgment asking that the intervention be dismissed and arguing that the contingency fee contract was not filed timely since it was filed after the settlement agreement had already been completed.

On March 5, 1986 intervenors filed an amended petition for intervention alleging the nullity of the settlement agreement because plaintiff was unrepresented and also alleging that the amount paid by defendants is grossly inadequate for the injuries sustained. Intervenors also alleged that the dismissal and final judgment of plaintiff's suit was null and void under R.S. 37:218 because they were entered subsequent to the filing and service of intervenors' petition and recordation of the contingency fee contract.

A hearing on the rule to show cause and motion for summary judgment was held on October 3, 1986. Based on the briefs and documents in the record, the trial court granted defendants' motion for summary judgment and dismissed the petition of intervention on October 28, 1986, finding that the contingency fee contract was not

timely filed. The trial court then held that the compromise agreement was "satisfactory and enforceable in plaintiff's best interests, and not overreaching."

The court of appeal affirmed finding intervenors, once discharged, had no standing to urge the invalidity of the settlement agreement.

A review of the jurisprudence dealing with R.S. 37:218 convinces us that the prior interpretation of this statute is not dispositive under the particular facts of this case. R.S. 37:218 reads as follows:

> "By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution or defense of which he is employed, whether the claim or suit be for money or for property. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition had been made."

In Saucier v. Hayes Dairy Products, Inc., 373 So.2d 102 (La. 1979), on rehearing, this court dealt with a case in which an attorney was dismissed without cause where a contingent fee contract existed between the attorney and his client. The attorney intervened in the personal

injury suit claiming one-third of any recovery by the client. There the court stressed that R.S. 37:218 is to be interpreted in light of other legal principles governing the conduct of attorneys in their relationships with their clients. A primary consideration in this regard is the court's duty to assert the authority given it by the Constitution to regulate the practice of law, which stems from the grant of original exclusive jurisdiction of disciplinary proceedings against a member of the bar. La. Const., Art. V, §5(B); see Louisiana State Bar Association v. Edwins, 329 So.2d 437 (La. 1976). This court's authority resulted in the adoption and promulgation of the Articles of Incorporation of the Louisiana State Bar Association, which in turn came to incorporate the Code of Professional Responsibility. The Code of Professional Responsibility regulates attorneys' practices and has been recognized as having the force and effect of substantive law. Legislative acts which tend to impede or frustrate this court's judicial authority in regulating the practice of law are without effect.

Under the disciplinary rules this court recognized the client's absolute right to discharge his attorney despite the existence of a contingency fee contract. The court also found that the disciplinary rules prohibit the acquisition of an absolute ownership interest in the client's claim prior to his performance of all or substantially all the legal services. The language of the statute giving the attorney "an interest in the subject matter of a suit" was interpreted by this court to be "no more than a privilege granted to aid the attorney's collection of a fully earned fee out of the fund which the satisfaction of the client's claim yields. Compliance with the statute would result in

the creation of a cause of action against the client and the opposing party for such fee as is legal and is earned in the event a settlement or other disposition results without the consent of the lawyer." Saucier v. Hayes Dairy Products, Inc., supra at 117.

This court went on to explain the manner in which the attorney's fee is to be determined: "The amount prescribed in the contingency fee contract, not quantum meruit, is the proper frame of reference for fixing compensation for the attorney prematurely discharged without cause." Saucier, supra at 118. The court discussed the rationale behind this method of computing fees saying in a footnote that this would serve to thwart a client's attempt to replace his attorney with another or to proceed in proper person in order to avoid payment of a contingency fee after substantially all of the legal services contemplated by the contract have been performed and settlement or judgment has been reached or is imminent. Saucier, supra fn. 8 at 118.

In Calk v. Highland Construction and Manufacturing, 376 So.2d 495 (La. 1979), the plaintiff reached a settlement agreement with the defendant in a personal injury case; a bank which held a prior judgment against the plaintiff, seized plaintiff's interest in the personal injury suit. Plaintiff's attorney, who had a contingent fee contract with plaintiff, also had a claim against the proceeds of the suit. Applying Saucier, supra, the court held that R.S. 37:218 gives the attorney, who has an interest in the claim, a privilege to the extent of his earned fee on any recovery obtained by settlement. This court held that an attorney's fee contract need not be recorded before the statutory privilege granted by R.S. 37:218 is effective.

However, in order to succeed, the attorney must assert his claim by intervention or other legal proceedings prior to disbursement of the proceeds to a third party. The court explained that the recordation language in the third sentence of R.S. 37:218 is not germane to the existence of the privilege created by the first sentence of the statute.

> "Based on this historical developments of R.S. 37:218, and what seems to be the intent of the Legislature in enacting that portion of Act 124 of 1906 which is now R.S. 37:218, we believe that R.S. 37:218 was intended to give attorneys comparable rights as are given in R.S. 9:5001. Under R.S. 9:5001, the attorney does not have to record the contract between himself and his client in order for the attorney to have priority on the proceeds recovered from a judgment on which a creditor has a claim under R.S. 13:3864. *See Roberts v. Hanover Insurance Company,* 338 So.2d 158 (La.App. 2nd Cir. 1976). Correspondingly, the attorney's fee contract, giving rise to the privilege granted by R.S. 37:218, does not have to be recorded to be effective. However, for the attorney to succeed he must assert his claim by intervention or other legal proceedings prior to disbursement of the proceeds to a third party. *Selly v. Watson,* 210 So.2d 113 (La.App. 1st Cir. 1968)." Calk v. Highland Construction & Manufacturing, supra at 499.

Thus, the attorney's statutory privilege, even though unrecorded, attaches to the settlement proceeds in preference to the claim of a seizing creditor, provided it is legally asserted before disbursement.

Scott v. Kemper Insurance Company, 377 So.2d 66, 70 (La. 1979) dealt with the issues of whether an attorney has the right to void a client's settlement made without the attorney's consent, and whether the attorney has a right to proceed with the claim as if no such settlement,

compromise, discontinuance or other disposition had been made. In Scott the attorney, who was discharged by plaintiff before settlement of the claim, intervened in the tort suit and sought to enforce the contingency fee contract. The court held that the statute cannot be literally applied to permit a discharged attorney with a recorded contingent fee contract to nullify a client's later settlement or to proceed with the litigation as though no settlement had been made. Such an application of the statute would conflict with the disciplinary rules recognizing a client's absolute right to discharge his attorney and prohibiting an attorney from acquiring a proprietary interest in the client's cause of action.

> "The obvious intent of R.S. 37:218 is to prevent a client's discharging an attorney and thereby depriving the attorney of his earned fee. Therefore, if the attorney with a written contingency fee contract bearing the no consent stipulation 'file[s] and records it with the clerk of court in the parish in which the suit is pending . .', then a defendant who disburses the settlement proceeds without ascertaining and paying the fee to which the attorney is due, will do so to his prejudice. The extinguishing effect of the settlement will therefore be suspended, as the Court of Appeal determined in this case, until recognition and payment of the fee to which the attorney is entitled, determined in accordance with the principles established in *Saucier*.
>
> Unlike the situation in *Calk*, where recordation of the contingency fee contract is irrelevant in a contest between an attorney and the client's creditor, imposition of an obligation upon the client's obligor in the suit to retain settlement funds until determination of fee entitlement, is dependent upon the attorney's full compliance with R.S. 37:218, including the recordation of the contract as stipulated therein."

Where a wife had a contingency fee contract with an attorney to represent her in the partition of the community, this court held that the attorney did not lose his privilege on the proceeds of the judgment against the husband, who was a party to the lawsuit, by failing to file notice of the privilege before the judgment was canceled where the contingency fee contract was recorded in both the suit record and mortgage records two days before cancellation of the judgment. Olivier v. Doga, 384 So.2d 330 (La. 1979). The court noted the language from Calk in which it was held that under R.S. 9:5001,[2] an attorney does not have to record the contract between himself and his client in order for the attorney to have priority on the proceeds from a judgment. Regarding this prior holding, the court stated as follows:

> " . . . As a mere observation, attorney-intervenor a fortiori should not be required to record his contract as against the husband who is a party to the lawsuit; but as noted above in *Calk*, recordation was not necessary and it was error for the Court of Appeal to restrict the operative effect of R.S. 9:5001 by imposing on it the restrictive requirement of prior recordation of the contingency fee contract." Olivier v. Doga, supra at 332.

The jurisprudence which has been developed regarding R.S. 37:218 was not designed to solve the problems created in this case. The jurisprudence under this statute, specifically Saucier, supra, makes clear that the statute

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[2] R.S. 9:5001 is the counterpart of R.S. 37:218 which grants attorneys a privilege " . . . for the amount of their professional fees on all judgments obtained by them, and on the property recovered thereby . . . "

has been interpreted so as not to conflict with the disciplinary rules regarding a client's right to discharge an attorney and the prohibition of an absolute ownership interest in a client's claim prior to the performance of all or substantially all the legal services by the attorney. However, this jurisprudence should not be used, as we believe it may have been used here, to circumvent the attorney-client relationship to the disadvantage of an unrepresented plaintiff, particularly where that plaintiff is a seaman. The disciplinary rules give guidance on the present issue as well and are to have no less weight and importance than the disciplinary rules considered in prior jurisprudence dealing with R.S. 37:218. DR 7-104 provides as follows:[3]

> "(A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel,

---

[3] The Rules of Professional Conduct replaced the former Code of Professional Responsibility effective January 1, 1987. However, the DR 7-104 quoted here was in effect at the time of the activities involved in this case. The new rules which replaced DR 7-104 are 4.2 and 4.3 The new rules incorporate the old rules but add the following provision in 4.2: "A lawyer shall not effect the prohibited communication through a third person including the lawyer's client."

> if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

Overlapping and bearing on the interpretation of R.S. 37:218 in this case, there is substantial federal jurisprudence recognizing the special status of seamen and defining the role of the state courts in the application of the law with regard to seamen. Of major importance is Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942) in which the United States Supreme Court rendered an opinion dealing with an injured seaman who executed a full release of his employer for which he was paid $100. Plaintiff claimed his signature on the release was obtained by fraud and misrepresentation and without valid consideration. The court held that the burden of proof for sustaining a release under the Jones Act is governed by the federal rule that the defendant has the burden of proof. The court reiterated a prior holding that the Jones Act is to have a uniform application throughout the country, unaffected by "local views of common-law rules." Panama R. Co. v. Johnson, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924). Therefore, the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. The court recites the history by which Congress has sought to safeguard seamen's rights in particular. Justice Story's language on the status of seamen is quoted as follows:

> " 'They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with

> their guardians, and cestuis que trust with their trustees. . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is, that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied that the compensation for every material alteration is entirely adequate to the diminution of right of privilege on the part of the seamen.' Harden v. Gordon (CC) 2 Mason 541, Fed Cas No. 6047." Garrett v. Moore-McCormack Co., supra at 246-247.

See also Parodi v. American President Lines, Ltd., 260 F.Supp. 696 (N.B. Calif. 1967).

Explaining this idea further as compared to other types of fiduciary-beneficiary relationships, the court notes that the fiduciary must affirmatively show that no advantage has been taken, and the burden is particularly heavy where there has been inadequacy of consideration:

> "The wardship theory has, as was recognized by the courts below, marked consequences on the treatment given seamen's releases. Such releases are subject to careful scrutiny. 'One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman.' Harmon v. United States (CCA 5th) 59 F(2d) 372, 373. *We hold, therefore, that the burden is upon one who sets up a seaman's release* to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing

> the release are relevant to an appraisal of this understanding." Garrett v. Moore-McCormack Co., supra at 247-248. (Emphasis added).

Furthermore, the law is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its wards. Warner v. Goltra, 293 U.S. 155, 55 S.Ct. 46, 79 L.Ed. 254 (1934); The Arizona v. Anelich, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075 (1936). The Pennsylvania Supreme Court in Garrett had concluded that it could apply its own procedural doctrine and that the placement of the burden of proof was a procedural rather than a substantive question. The United States Supreme Court found this conclusion incompatible with the necessity of preserving all of the substantial admiralty rights. When the Pennsylvania courts were opened to plaintiff to enforce federally created rights, the plaintiff was entitled to the benefit of the full scope of those rights.

The federal courts have consistently applied the reasoning of Garrett. Seamen are wards of admiralty, and releases or settlements involving a seaman are subject to careful scrutiny. Wink v. Rowan Drilling Co., 611 F.2d 98 (5th Cir. 1980), cert. denied 449 U.S. 823, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980). The ultimate concern in cases involving the rights of seamen or their family members is not whether the seaman has received what the court believes to be adequate consideration, but, rather, whether the seaman relinquished his rights with informed understanding of his rights and a full appreciation of the consequences when he executed the release. Stipelcovich v. Sand Dollar Marine, Inc., 805 F.2d 599 (5th Cir. 1986). A release is not valid unless it has been executed without

deception or coercion. Durden v. Exxon Corp., 803 F.2d 845 (5th Cir. 1986). The courts of appeal must be particularly vigilant to guard against overreaching when a seaman purports to release his rights to compensation for personal injuries. Borne v. A & P Boat Rentals No. 4, Inc., 780 F.2d 1254 (5th Cir. 1986). Releases signed by seamen are given the most careful scrutiny and the burden is on the shipowner to show that the seaman signed the release with full understanding of his rights and the effect of his action. Halliburton v. Ocean Drilling & Exploration Co., 620 F.2d 444 (5th Cir. 1980).

The Louisiana courts have followed this line of reasoning, saying that substantive maritime law controls in state court and the state cannot, by its procedural practice, substantially alter the rights of litigants under substantive maritime law. Lavergne v. Western Co. of North America, Inc., 371 So.2d 807 (La. 1979); Rojas v. Robin, 90 So.2d 58 (La. 1959); Morris v. M/V Creole Belle, 394 So.2d 727 (La.App. 3rd Cir. 1981).

In Ray v. Defelice Marine Contractors, Inc., 439 So.2d 1102 (La.App. 5th Cir. 1983), cert. denied 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 36 (1984) a seaman, whose left leg was amputated as a result of a maritime injury, entered into a settlement with his employer for $115,000. Several doctors testified that Ray was an immature, impulsive, nineteen-year-old who had limited judgment and did not have a full appreciation of his injury. Recognizing its obligation to carefully scrutinize the seaman's release and the special relationship a seaman holds as a ward of the court, the court of appeal found that an interpretation of whether Ray had a full understanding of his rights includes not only an intellectual understanding but also

an emotional understanding. The court took into account the fact that prior to and including the time of the execution of the release, he did not have his own legal counsel. "Coupled with these factors is the realization Ray released his rights for a very serious injury which, pending proof of liability and numerous other factors, could be valued at a sum several times more than the settlement." Ray, supra at 1105. The court quoted both Justice Story, supra and Garrett, supra, on the concept of seamen as wards of the court. The court concluded:

> "This case does not present a situation of a medical miscalculation of the consequences of an injury but, rather, an emotional inability to understand the consequences of an injury. This court does not find a failure to disclose any known material medical facts nor fraud, deception, or coercion. However, when considering the totality of the circumstances, this court finds at the time of the execution of the release, Ray did not have a full understanding of his rights. Therefore, the release ought to be set aside as inequitable." Ray v. Defelice Marine Contractors, Inc., supra at 1105.

The issue here is not so much the impact of the post-settlement dismissal and granting of the defendants' motion for summary judgment on the intervenors' contingent fee contract. Intervenors continue to have a right of action to obtain payment of their fee. However, intervenors' major concern appears to be the method by which the release was obtained and the trial court's action in validating the release. We share this concern.

In the present case, a young seaman entered into negotiations with the defendants before any formal discharge of the intervenors had been made. Defendants

knew that plaintiff was represented or had been represented by counsel. Defendants knew of the apparently serious nature of plaintiff's injuries. Plaintiff had been in intensive care for five-six days after the accident and was hospitalized for two and one-half weeks. He had undergone surgery and still faced further surgery to help repair a hearing deficiency in his left ear, to lessen the partial paralysis on the left side of his face, and to attempt to restore the ability to more fully close his left eye. These specific problems are listed in the release form, evidencing defendants' awareness of the extent of plaintiff's physical injuries. Defendants also knew plaintiff had been under the care of a psychiatrist and a neuropsychologist.

The trial court had before it, at the time of the motion for summary judgment, a report to the defendants by a psychiatrist, Dr. Robert Davis, attesting to plaintiff's serious emotional instability. The trial court also had before it, at the time of the dismissal, a petition in which plaintiff had been represented by the intervenors. There is nothing in the record showing that intervenors were notified of the pending dismissal, nor does the record show that the trial court made any inquiry about the pro se motion to dismiss.

Plaintiff's deposition was also in the record when the summary judgment was granted. This deposition makes clear that there were serious questions as to plaintiff's understanding of what he agreed to in the release. Plaintiff testified that he originally negotiated for $50,000 plus the payment of all of his future surgeries, not just the two surgeries provided for in the written release. Plaintiff also said he asked for and was assured that all of his legal fees

would be paid including the costs intervenors had incurred on plaintiff's behalf. These provisions were not included in the written release submitted into the record.

Because a seaman is involved in this case, we find that the court had an obligation to scrutinize the release prior to granting the joint motion for dismissal. Additionally, a motion for summary judgment should be granted if, and only if, the pleadings and related filings show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. Ray v. Associated Indemnity Corporation, 373 So.2d 166 (La. 1979). In this case, the pleadings and related filings indicate there are genuine issues of material fact which precluded the grant of a summary judgment.

The court of appeal found that the intervenors had no standing before either of the lower courts to urge the invalidity of the plaintiff's receipt and release. We disagree. This court has held that under C.C.P. 2086,[4] a creditor has a right to appeal even though he was not a party to the proceeding. Pennison v. Pennison, 250 La. 303, 195 So.2d 276 (1967). As creditor, the intervenors in this case had a right to appeal.

In addition, under Canon 7 of the Code of Professional Responsibility, EC 7-12 is instructive under the particular facts of this case. EC 7-12 reads as follows:

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[4] C.C.P. 2086 reads as follows: "A person who could have intervened in the trial court may appeal, whether or not any other appeal has been taken.

> "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

Because, as discussed above, the plaintiff is treated as a ward of the court, the intervenors had a right to appeal and call upon the court to protect plaintiff's interests where the plaintiff had entered into the release and dismissal without representation.

Under the circumstances of this case, where an unrepresented seaman is involved, before the trial court could dismiss the case and render a judgment or grant a summary judgment, both of which were based on the adequacy of the compromise and release agreement, the trial court had a duty to scrutinize the release. It was not proper for the trial court to hold, as it did in this case,

that the release was satisfactory, enforceable and in plaintiff's best interest without first receiving evidence regarding the plaintiff's condition, the circumstances under which the agreement was reached, and the adequacy of the consideration. The court should look to whether the seaman relinquished his rights with informed understanding and a full appreciation of the consequences when he executed the release. The fact that plaintiff had been represented but was unrepresented at the time of the negotiation of the contract should lead the trial court to investigate further. A seaman is to be treated as a ward of the court, and the defendant has the burden of proof in sustaining a release under federal maritime law.

The judgment dismissing plaintiff's suit and the order granting defendants a summary judgment dismissing the intervention are reversed and remanded for further proceedings consistent with this opinion, all at the cost of defendants.

SUPREME COURT OF LOUISIANA

NO. 88-C-0618

RANDY NEELY

versus

HOLLYWOOD MARINE, INC. and
TENNECO OIL COMPANY

JUSTICE LEMMON, Dissenting

—If plaintiff had joined in the demand to annul the compromise, I would agree that the trial court erred in granting a summary judgment which purported to approve the release. However, plaintiff did not assert such a demand (which is the reason that the summary judgment, if affirmed, would not bar by res judicata the pending action for nullity of the compromise that plaintiff, through rehired counsel, has filed in federal court). The problem in this case is that the demand for nullity was filed in the trial court by plaintiff's then discharged counsel.[1]

An attorney, who has been discharged after representing a party under a contingent fee contract, has no real and actual interest in attacking a compromise and therefore has no right of action to assert the invalidity of the compromise, even under the compelling facts alleged to

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[1] The majority misses the mark in concluding that intervenors had the right to appeal the dismissal of the principal demand under La. C.C.P. art. 2086. Intervenors had no right of action to assert the invalidity of the compromise either by principal demand, by intervention or by appeal.

have occurred in this case. Obviously the party himself has a right of action to attack a compromise. Even if the alleged conduct in the present case gave rise to a *cause of action* for nullity of the compromise, the *right of action* vests solely in the plaintiff.

I have not seen any argument which suggests that the plaintiff in this case will not be adequately protected by his right to file suit to annul the compromise or which requires the extraordinary action taken by the majority in this case. Once the plaintiff is adequately represented and the parties are properly aligned, the court in which an action to annul is filed can consider any undue influence or unacceptable conduct which may have occurred in the confection of the compromise. Furthermore, any unethical behavior by a Louisiana attorney can be considered in the appropriate disciplinary proceedings. Finally, intervenors still have a right of action to seek recovery of their fee from these defendants or from the plaintiff, whether or not the plaintiff decides to pursue an action to annul the compromise.

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 106

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 20th day of October 1988, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

87-C-1619	Succession of Noah Cloud
87-CC-2360	Tammy Dupre Pitre, et al vs. Opelousas General Hospital, et al
88-C-0296	In the Matter of the Succession of Robert Mirkil Talbot
88-C-0323	Succession of Donald F. Blythe MARCUS, J., would grant a rehearing. WATSON, J, would grant and assigns reasons. LEMMON, J., concurs in the denial.
88-C-0538	Harvey Manasco v. Samuel Poplus, Sr., et al
88-C-0546	Katherine H. Nasello v. Transit Casualty Co., et al c/w Brenda Beckman v. Transit Casualty Co., et al c/w Pauline Castaldie, et al v. Transit Casualty Co., et al

88-C-0618 Randy Neely v. Hollywood Marine, Inc., et al
Two Applications.
DENNIS, J., concurs in the denial of rehearing.
LEMMON, J., would grant a rehearing.
